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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

WALTER R. DOLLOFF, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

The Petitioner, Walter R. Dolloff, prays that a writ of certiorari issue to review the judgment entered on the 8th day of July, 1941 in the United States Circuit Court of Appeals, Eighth Circuit in the above entitled cause and for his petition for such writ states to this Honorable Court:

SUMMARY STATEMENT OF MATTER INVOLVED.

This cause involves a prosecution and conviction for a violation of the Liquor Enforcement Act of 1936. (27 U.S.C. 223). Specifically, the Petitioner was charged with "attempting" to transport intoxicating liquor out of the State of Missouri and into the State of Kansas.

The Liquor Enforcement Act of 1936 prohibits an attempt to transport intoxicating liquor into any state, which is otherwise qualified under the Act, if that state prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. The State of Kansas does not prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. Kansas prohibits all sales for beverage purposes of intoxicating liquor containing more than 3.2 per cent of alcohol by weight. A measurement of 3.2 per cent of alcohol by weight will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume.

The difference between a measurement of 3.2 per cent of alcohol by weight and 4 per cent of alcohol by volume is not great. Nevertheless, it is a measurable amount. It varies with the specific gravity of the beverage. Beer, for example, containing 3.2 per cent of alcohol by weight will contain, depending upon the ingredients in the beer, 4.05 to 4.2 per cent of alcohol by volume.

The Liquor Enforcement Act of 1936 is not ambiguous in its provisions defining the States which are protected by it, i. e., those States which prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume.

However, if the Report of the House Committee on the Judiciary, 74th Congress, First Session, Report No. 1258, is consulted, it would appear that said committee and thus, possibly Congress, itself, at the time it passed the Liquor Enforcement Act of 1936 believed that the terms "3.2 per cent of alcohol by weight" and "4 per

cent of alcohol by volume" provided for identical measurements, to the same effect as would be the case in terms that provided for a measurement of one foot in one case and 12 inches in another.

The Circuit Court of Appeals, Eight Circuit, disregarded the difference between the Federal and the Kansas statutes and held that under the foregoing circumstances the Liquor Enforcement Act of 1936 applied to the State of Kansas. (R. 65-71.)

SUMMARY STATEMENT OF MATTER INVOLVED WITH CITATIONS TO THE RECORD.

Prosecution of the Petitioner was instituted and conviction had in the United States District Court for the Western District of Missouri. (R. 1-17.)

The following statement, taken from the opinion of the United States Circuit Court of Appeals, Eighth Circuit, clearly, briefly, succinctly and accurately summarizes the proceedings had in the trial court, the charge filed against the Petitioner, the defense made thereto by the Petitioner, the proceedings on appeal in said Circuit Court and the essential portions of the applicable statutes and therefore and because of the verity which inheres in said opinion, the Petitioner adopts said statement as an authentic statement of the matter involved. The statement contained in the Court's opinion is: (R. 65-67.)

> "Appellant was convicted on a charge of attempting to transport intoxicating liquor out of the State of Missouri and into the State of Kansas in violation of the Liquor Enforcement Act of 1936. We shall refer to appellant as defendant. The informa-

tion on which he was tried and convicted charged that,

> ' * * * the defendant, Walter R. Dolloff, being in possession of intoxicating liquor containing more than 4 per cent of alcohol by volume, to-wit, 152 gallons, more or less, of assorted whiskey, wine and gin, said intoxicating liquor being then and there transported in a motor car controlled and operated by the defendant, did unlawfully, knowingly and willfully attempt to transport said intoxicating liquor from and out of the State of Missouri into the State of Kansas, to Wichita, Kansas, in which said State of Kansas all sales (except for sacramental, scientific, medicinal and mechanical purposes) of intoxicating liquors containing more than 4 per cent of alcohol by volume, are prohibited * * * .'

"Defendant interposed a plea in bar on the ground that the Liquor Enforcement Act of 1936 did not apply to the State of Kansas for the reason that the State of Kansas did not prohibit all sales of intoxicating liquor containing more than 4 per cent of alcohol by volume. Defendant waived trial by jury and the court heard evidence offered in support of the issue raised by the plea in bar and denied the plea. After some proceedings not here material, defendant entered a plea of not guilty and again waived trial by jury and consented that the case be tried to the court. The evidence offered on the issue raised by the plea in bar was resubmitted. Defendant offered no evidence except that offered in support of his plea in bar, and at the close of the Government's evidence moved for judgment of acquittal on the ground that the evidence did not establish that the State of Kansas prohibited all sales of intoxicating liquor for beverage purposes containing more than 4 per cent of alcohol by

volume. This motion was overruled and the court found the defendant guilty and entered judgment sentencing him to prison.

"On this appeal defendant challenges the correctness of the court's order overruling his plea in bar, and likewise, its ruling in denying his motion for judgment of acquittal. But one question is presented and that is whether the Liquor Enforcement Act of 1936 (27 U.S.C.A. Sec 223) is applicable to the transportation of intoxicating liquor into the State of Kansas. This Act, so far as here applicable, reads as follows:

> '(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum, of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> '(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter, the definition of intoxicating liquor contained in the laws of such State shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific,

sacramental, medicinal, and mechanical purposes) are prohibited in such State.'

"The laws of Kansas pertaining to the sale of intoxicating liquors read as follows:

"21-2101, G. S. 1935. 'It shall be unlawful for any person to directly or indirectly * * * sell * * * any spirituous, malt, vinous, fermented or other intoxicating liquors * * * .'

"21-2109, G. S. 1939 Supp. 'The term (spirituous), malt, vinous, fermented or other intoxicating liquors as used in Sections 21-2101 to 21-2108, inclusive, of the General Statutes of 1935, and all amendments thereto, are hereby defined to include all beverages which contain more than three and two-tenths per cent (3.2%) of alcohol by weight and all such beverages are hereby declared to be intoxicating liquors under the law of this state.'

"21-2109a. G. S. Supp. 'The words 'intoxicating liquors' or 'intoxicating liquor' wherever used in the General Statutes of 1935, and acts amendatory thereto, shall be construed to mean all such beverages referred to in Section 1 (21-2109) which contain more than three and two tenths per cent (3.2%) of alcohol by weight.'

"Section 6, Chapter 179, Laws of Kansas, [1935,] (1939) reads as follows:

'This act is intended to qualify Kansas for protection under the Twenty-first Amendment to the Constitution of the United States.' "

Evidence to show the relationship between a measurement of 4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight was submitted to the trial

court upon the hearing upon the plea in Bar, (R. 30-39) and upon the case upon the merits (R. 49-Stip). In the proceedings upon the plea in bar the trial court made findings of facts and conclusions of law. Those findings of fact material here were as follows: (R. 41-42.)

"5"

"That an alcoholic mixture can be prepared which will contain 3.2% of alcohol by weight and 4.9% of alcohol by volume; that such mixture in the strict sense of the words would be a potable beverage but that there is no such mixture sold as a beverage, or in general use as a beverage."

"6"

"That the common alcoholic liquors in general use are whiskey, brandy, rum, gin and beer and wine; that whiskey, rum, gin and brandy are distilled liquors with an alcoholic content greatly in excess of either 3.2% by weight or 4% by volume; that said liquors are mixtures of alcohol and water with small traces of other solids; that were a beverage prepared containing the same proportion of solids as the said liquors, only 3.2% of alcohol by weight and the remainder of water, that said liquors would contain 4% of alcohol by volume; that beer and wine have a slightly higher percentage of solids than the liquors aforesaid; that beers and wines containing 3.2% of alcohol by weight will have slightly in excess of 4% of alcohol by volume and that said excess is usually so small as to be disregarded in ordinary commercial laboratory tests."

"7"

"That the generally accepted table for measuring the relative quantities of alcohol in alcoholic beverages by weight and by volume is the table pub-

lished by the United States Bureau of Standards, of which the court will take judicial notice and which was referred to in evidence, that (fol. 56) by said table an alcoholic beverage containing 3.2% of alcohol by weight will contain approximately 4% of alcohol by volume."

The Petitioner objected to certain findings of fact made by the trial court as follows: (R. 44-45.)

"Defendant objects and excepts to that portion of Finding of Fact number 6 in words and figures as follows:

> 'that said liquors are mixtures of alcohol and water with small traces of other solids; that were a beverage prepared containing the same proportion of solids as said liquors, only 3.2% of alcohol by weight and the remainder of water, that said liquors would contain 4% of alcohol by volume.'

for the reason that said Finding is contrary to the undisputed evidence and contrary to the Government's evidence and is not sustained by any evidence in the record.

"Defendant further objects and excepts to that portion of Finding of Fact 6 as follows:

> 'and that said excess is usually so small as to be disregarded in ordinary commercial laboratory tests.'

for the reason that said finding is contrary to the Government's evidence and contrary to the undisputed evidence and is not sustained by any evidence in the record.

"Defendant further excepts and objects to the Court's Finding of Fact 7 for the reason that the evidence does not sustain said Finding insomuch as said Finding finds that the tables published by the

> U. S. Bureau of Standards establish that an alcoholic beverage containing 3.2% of alcohol by weight will contain approximately 4% of alcohol by volume, is [it] specifically and definitely appearing by the undisputed evidence that said tables pertain only to mixtures of alcohol and water and even said tables do not establish that a mixture of alcohol and water containing 3.2% of alcohol by weight will not contain more than 4% of alcohol by volume. On the contrary, said tables establishing that in a mixture of alcohol and water containing 3.2% of alcohol by weight that such mixture will contain more than 4% of alcohol by volume."

The Petitioner's objections to the findings of fact made by the trial court were disallowed (R. 45).

There were only three witnesses who testified in the trial court in regard to the relationship between a measurement of 3.2 per cent of alcohol by weight and a measurement of 4 per cent of alcohol by volume. They were two witnesses offered by the Petitioner, Mr. Means and Mr. Hawthorne, and one witness offered by the Government, Mr. Dale. (R. 30-39.)

The witnesses were in accord on the proposition that a measurement of 3.2 per cent of alcohol by weight would always permit a beverage to contain more than 4 per cent of alcohol by volume.

The problem was first approached from a viewpoint of a mixture of alcohol and water alone.

Thus, Mr. Dale testified: (R. 37).

> "A solution of alcohol and water containing 3.2% of alcohol by weight would contain more than 4% of alcohol by volume."

Mr. Means testified (R. 33):

> "A solution of nothing but alcohol and water containing 3.2% of alcohol by weight would contain in the neighborhood of 4.01 or 4.02% of alcohol by volume."

Mr. Hawthorne testified (R. 33):

> "A mixture of alcohol and water only containing 3.2% of alcohol by weight would have more than 4% of alcohol by volume."

Next, the problem was approached considering a mixture of beer. Here again, the witnesses were in accord on the proposition that all beers containing 3.2 per cent of alcohol by weight would contain more than 4 per cent of alcohol by volume.

Thus, Mr. Dale testified: (R. 37)

> "Anytime solids in a mixture of alcohol and water are increased, there is an increase in the percentage of alcohol by volume over the percentage of alcohol by weight.
>
> "In a beer which contains 3.2% of alcohol by weight and 6.2 of solids, the alcoholic percentage by volume is 4.1. If the solid content in the beer is increased to 11.7, the alcoholic content in per cent by volume would be 4.2."

Mr. Means testified: (R. 33)

> "Ordinary beers contain other matters beside alcohol and water. A beer which contained 3.2% of alcohol by weight would contain more alcohol than 4% by volume. It would be 4.1% to 4.2% by volume."

Mr. Hawthorne testified: (R. 33-34)

> " * * * A beer which contains 3.2% of alcohol by weight will contain more than 4% of alcohol by volume. Such beers contain from 4 to 6½ and 7% of solid matter consisting of sugar, dextrine, glycerine and various mineral substances. An ordinary beer containing 3.2% of (fol. 48) alcohol by weight would contain 4.2 or 4.3% of alcohol by volume."

Next, the problem was approached from the viewpoint of an experimental potable alcoholic beverage containing 3.2 per cent of alcohol by weight with a high solid content and an alcoholic per cent by volume greatly in excess of 4 per cent by volume.

The witnesses were in accord upon the proposition that a mixture of alcohol, sugar and water could be prepared which would contain 3.2 per cent of alcohol by weight and 4.9 per cent of alcohol by volume.

Thus, Mr. Means testified: (R. 30-31)

> "The witness, sometime before testifying, prepared a solution of alcohol, sugar and water for the purpose of determining how much the percentage of alcohol would be in the solution if it was prepared so as to have 3.2% of alcohol by weight. The experimental solution contained 3.2% of alcohol by weight and approximately 4.9% of alcohol by volume. The witness is an average man and he tasted the solution and found it potable to him and he considered it potable to the average man."

Mr. Dale testified: (R. 37-38)

> "A mixture of alcohol, sugar and water as prepared experimentally by Mr. Means can be pre-

pared as he testified, viz., it would contain 3.2% of alcohol by weight and 4.9% of alcohol by volume.

"Any time solids in a mixture of alcohol and water are increased, there is an increase in the percentage of alcohol by volume over the percentage of alcohol by weight.

" * * * As there would be an increase in the solid content in the liquid, the change in the percentage by volume of the alcoholic content would continue to increase until you reach 4.9% by volume. The increase in the alcoholic content expressed in percentage by volume could exceed that figure.

"When the per cent of solids in the liquid is 48.1%, you would have an alcoholic content of 4.9% by volume."

Mr. Hawthorne testified: (R. 33)

"Mr. Means' testimony to the effect that a potable alcoholic beverage could be prepared which would be 3.2% of alcohol by weight and 4.9% of alcohol by volume is correct."

The witnesses were in agreement on the proposition that the distilled liquors, whiskey, brandy, gin, and rum contained water and alcohol and a slight amount of solids and that for practical purposes whiskey might be considered a mixture of alcohol and water.

Thus, Mr. Means testified: (R. 32-33)

"The average whiskey contains other things than water and alcohol in it, all depending upon how good a job the distiller did. The witness presumes that the other things in the average whiskey are probably one half of one per cent. For practical purposes whiskey is a mixture of alcohol and water. Whether it is only a mixture of alcohol and water

for the purpose of determining weight and volume per cent depends upon the purpose of the determination and the accuracy desired. The measurement can be extremely accurate up to the fifth place by the exercise of ordinary care depending upon the purpose for making the measurement.

"The average gin upon the market contains water, alcohol, glycerine and juniper. The witness did not know how much glycerine and juniper the average gin contained.

"Brandy is distilled wine, grape brandy being distilled from grape juices. Grape brandy contains about the same proportion of alcohol as whiskey. A table showing the relation of 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water would show pretty closely the relation of 'per cent by volume' and 'per cent by weight' in a similar solution of whiskey, gin and brandy.

"There are a number of such tables and one by the United States Bureau of Standards, Circular number 19, page 18, 1924, is an authority. The witness does not regard it as 'the' authority.

"The witness was handed a table showing the relation between 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water. The table showed that a solution of alcohol and water containing 4% of alcohol by volume contained 3.194% of alcohol by weight. The table was an abridged table. The relation between 'per cent by volume' and 'per cent by weight' shown by the (fol. 47) table were in accordance with the witness' personal experience.

"In an assumed whiskey which had other substances in it and which contained only 4% of alcohol by volume, it would come within several hundredths of a per cent of containing 3.2% of alcohol by weight. It is not usual in an ordinary commercial laboratory to carry calculations out to several hundredths of a per cent. In an ordinary commer-

cial laboratory under careful analysis per cent can be determined to a ten thousandth."

Mr. Dale testified: (R. 36)

"The witness is familiar with the chemical composition of whiskey, and gin. Other distilled liquors are whiskey, gin, brandy and rum. These liquors are mixtures of alcohol and water with some other substances.

"It is the witness's opinion that if whiskey, gin or brandy were prepared to contain 3.2% of alcohol by weight and the remainder was water and whatever other substances are generally in whiskey, that for practical commercial purposes the percentage of alcohol by volume would be 4%."

There was no evidence produced which contradicted the foregoing testimony. Nor, was there any evidence which in any way threw doubt upon the propositions established by the foregoing testimony.

Hence, the trial court's Finding of Fact number 6, if it was material, as follows:

" * * * that were a beverage prepared containing the same proportion of solids as the said liquors (whiskey, rum, gin, and brandy), only 3.2% of alcohol by weight and the remainder of water, that said liquors would contain 4% of alcohol by volume * * * ." (R. 42)

is not sustained by any evidence and is contrary to the evidence because all witnesses testified that a mixture of alcohol and water containing 3.2 per cent of alcohol by weight would contain more than 4 per cent of alcohol by volume and that whenever solids were present in a liquid the variation between 4 per cent of alcohol by volume was greater.

The trial court in the latter part of Finding of Fact number 6 found that beers and wines containing 3.2 per cent of alcohol by weight will have slightly in excess of 4 per cent of alcohol by volume and further found:

> " * * * that said excess is usually so small as to be disregarded in ordinary commercial laboratory tests." (R. 42.)

The trial court did not state what difference it made on the question of whether a measurement of 3.2 per cent of alcohol by weight was the same or less than a measurement of 4 per cent of alcohol by volume, even if it were true that in ordinary commercial laboratory tests it was usual to disregard the difference between a beer or wine which contained 3.2 per cent of alcohol by weight and a beer or wine which contained 4 per cent of alcohol by volume.

The usual practice of the commercial laboratories to disregard the difference does not appear to be material on the question as to whether there is a difference.

But if the practice of the commercial laboratories was material to the question before the Court, there was still no evidence to support the Finding and the Finding was contrary to the evidence.

All witnesses testified that a beer containing 3.2% per cent of alcohol by weight could at least contain 4.2 per cent of alcohol by volume.

Mr. Dale, the chemist in charge of the Alcohol Tax Unit Laboratory in Kansas City, Missouri testified that in testing alcoholic beverages in his laboratory, in the case of beer, they allowed possibly a variation of .05 of a per cent.

Thus, Mr. Dale testified: (R. 36 para. 2)

> "In testing alcoholic beverages in the laboratory where witness works, they allow a variation from the accepted standard. They, depending upon the necessity for accuracy, allow in the case of beer, possibly .05 of a per cent. The analysis can be made more accurately but ordinarily that is close enough."

Mr. Means testified that the commercial laboratories' practice was similar to the practice in the Alcohol Tax Unit Laboratory.

Thus, Mr. Means testified: (R. 32, 33)

> "It is not usual in an ordinary commercial laboratory to carry calculations out to several hundredths of a per cent. In an ordinary commercial laboratory under careful analysis per cent can be determined to a ten thousandth."

Mr. Hawthorne testifying concerning the practice in testing beers for solids testified: (R. 34, para. 2)

> "In testing beers for solids, the analysis is not usually carried beyond the first decimal point, sometimes to two. Carrying an analysis out to the third decimal point is done in the greatest precision work only. It is not done in ordinary commercial work."

None of the witnesses testified that it was a usual practice, in a commercial laboratory or any other kind of a laboratory, to disregard tenths of a per cent in testing alcoholic beverages for alcoholic content.

Mr. Dale testified that the Alcohol Tax Unit allowed the variation of possibly .05 of a per cent. Mr. Means testified that commercial laboratories allowed a varia-

tion of several hundredths of a per cent and Mr. Hawthorne was testifying about a test for solid content and not alcoholic content.

In Finding number 7, (R. 43), the trial court found that the United States Bureau of Standards Table, referred to in the evidence, showed that an alcoholic beverage containing 3.2 per cent of alcohol by weight would contain approximately 4 per cent of alcohol by volume. The only such table referred to in the evidence was referred to by Mr. Means and Mr. Dale. It was a table showing the percentages by weight corresponding to various percentages by volume in a mixture of Ethyl Alcohol and water.

Thus, Mr. Dale testified: (R. 35, 36)

> "The witness identified a portion of a book entitled Methods of Analysis A.O.A.C., Fourth Edition, 1935 published by the Association of Official Agricultural Chemists in Washington, D. C. His attention was directed to page XLIII in the supplement. That page contained a table showing percentages by weight corresponding to various percentages by volume at 60° Farenheit in mixtures of Ethyl Alcohol and water. It is a transcript of the Bureau of Standards Circular No. 19, page 18.
>
> "The Bureau of Standards is in the Department of Commerce and its purpose is to standardize various terms and standards. The table is a generally recognized authority in the chemical profession and regarded as an authority in the testing of alcohol and potable beverages. A mixture of Ethyl Alcohol and water containing 4% of alcohol by volume, by this table contains 3.194 of alcohol by weight. That figure is more accurately determined than is generally done in ordinary laboratory practice."

Mr. Means testified: (R. 32)

> "A table showing the relation of 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water would show pretty closely the relation of 'per cent by volume' and 'per cent by weight' in a similar solution of whiskey, gin and brandy.
>
> "There are a number of such tables and one by the United States Bureau of Standards, Circular number 19, page 18, 1924, is an authority. The witness does not regard it as 'the' authority.
>
> "The witness was handed a table showing the relation between 'per cent by volume' and 'per cent by weight' in a solution of alcohol and water. The table showed that a solution of alcohol and water containing 4% of alcohol by volume contained 3.194% of alcohol by weight. The table was an abridged table. The relation between 'per cent by volume' and 'per cent by weight' shown by the (fol. 47) table were in accordance with the witness' personal experience."

Notwithstanding the foregoing evidence, which was uncontradicted, the Circuit Court affirmed the conviction of the Petitioner and in its opinion stated:

> " * * * From the testimony so presented (the testimony showing the relationship between a measurement of 3.2 per cent by weight and 4 per cent by volume) the court found in effect that an alcoholic beverage containing 3.2 per cent of alcohol by weight will contain approximately 4 per cent of alcohol by volume. This finding was sustained by substantial testimony." (R. 68.)

There was no evidence on the proposition that in any way modified the effect of the evidence heretofore set out in this petition. Hence, the evidence set out in this

petition is the only evidence necessary to consider in connection with the Circuit Court's statement as to what the trial court found.

The Circuit Court then set out in its opinion a portion of the Report of the House Committee on the Judiciary, 74th Congress, First Session, Report No. 1258 as follows:

> " * * * The bill extends this affirmative protection to States which forbid all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume (3.2 per cent of alcohol by weight). Your committee felt it was essential to protect States which permit the sale of liquor containing as much as 4 per cent of alcohol by volume, in order to keep faith with the action taken by Congress in the so-called 'Cullen Beer Act' of March 22, 1933." (R. 69.)

The paranthetical insertion in the portion of the Committee's report set out in the Circuit Court's opinion sustains the inference that the Committee believed and therefore, possibly Congress, itself, believed at the time it passed the Liquor Enforcement Act of 1936, that the terms "3.2 per cent of alcohol by weight" and "4 per cent of alcohol by volume" provided for identical measurements, to the same effect as would be the case in terms that provided for a measurement of one foot in one case and 12 inches in another.

The Circuit Court's opinion shows that it consulted scientific authorities—Department of Commerce Bureau of Standards, Remington's Practice of Pharmacy, Rogers' Manual of Industrial Chemistry and Standard Encyclopedias. These authorities, the Court found, were to the effect "that 4 per cent of alcohol by volume and 3.2

per cent of alcohol by weight are substantially identical."

The Court found that the scientific authorities consulted by it were corroborative of the testimony in the case. Thus, it said:

> "These authorities are corroborative of the testimony in this case, * * * ." (R. 69 Para. 5.)

Aside from the references made by the chemists, Mr. Dale and Mr. Means in their testimony, (R. 35, 32) to the transcript of the Bureau of Standards Circular No. 19, page 18, which was:

> " * * * a table showing percentages by weight corresponding to various percentages by volume at 60° Fahrenheit in mixtures of Ethyl Alcohol and water."

and which was not introduced into evidence, there was no mention made of any scientific authorities in the trial court.

The authorities which the Circuit Court stated it had consulted and which it found were to the effect that "4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight are substantially identical" were not in evidence in the case. Nor, were said authorities cited to the Circuit Court by either the appellant or the appellee.

The Circuit Court's consideration of the scientific authorities mentioned in its opinion was done upon its own resources.

In affirming the conviction of the Petitioner and holding that the Liquor Enforcement Act of 1936 applied to the transportation of intoxicating liquor into

the state of Kansas, the Circuit Court based its decision upon a combination of the following three propositions:

1. The evidence supported the trial court's Finding of Fact which the Circuit Court construed to be "in effect that an alcoholic beverage containing 3.2 per cent of alcohol by weight will contain approximately 4 per cent of alcohol by volume."

2. Its independent investigation of scientific authorities which it found corroborated the evidence upon which the trial court's Finding was based.

3. Its consideration of the legislative history of the enactment of the Liquor Enforcement Act of 1936, viz., the Report of the Committee on the Judiciary of the House of Representatives and its examination of the so-called Cullen Beer Act.

Thus, it was said in the opinion of the Circuit Court:

"It appearing affirmatively from the evidence as well as from the recognized scientific authorities and the legislative history of the enactment of the Liquor Enforcement Act of which we may take judicial notice, that the Liquor Enforcement Act is applicable to the State of Kansas, the judgment of conviction appealed from is affirmed. (R. 70.)

STATEMENT OF PETITIONER'S CONTENTION AS TO THE BASIS OF AUTHORITY OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT IN THIS CAUSE.

The judgment of the Circuit Court of Appeals, Eighth Circuit which this Petitioner seeks to have reviewed was entered on the 8th day of July 1941. (R. 70-71.) It affirmed Petitioner's conviction for a violation of the Liquor Enforcement Act of 1936 (27 U.S.C. 233).

28 U.S.C. 347 provides that in any case, civil or criminal, in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether Government or other litigant, to require by certiorari after the judgment of such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought to the Supreme Court by unrestricted appeal.

Paragraph XI of Rules of Practice and Procedure After Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases Brought in the District Courts of the United States promulgated by the Supreme Court of the United States pursuant to the provisions of the act of Congress approved March 8, 1934, amending an act entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict." (Act of Feb. 24, 1933, 47 Stat. at L. 904, Ch. 119, 28 U.S.C.A. 723a) provides that petitions to the Supreme Court of the United States for writ of

certiorari to review a judgment of the appellate court shall be made within thirty days after the entry of the judgment of that court.

In view of the nature of this case, the date upon which the Circuit Court of Appeals, Eighth Circuit, entered its judgment, and in view of the statutes and court rules above mentioned, the Supreme Court of the United States has jurisdiction to review the aforesaid judgment of the Circuit Court by issuing a writ of certiorari herein. This Petition for a writ of certiorari is filed on or before August 12, 1941. (Rules of Practice and Procedure in Criminal Cases Promulgated by the Supreme Court of the United States, May 7, 1934. Para. 2 of Rule XIII)

THE QUESTION PRESENTED.

The question presented is:

Whether, when a Federal statute prohibits the attempt to transport intoxicating liquor into a State if, and only if, the State prohibits all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume, making it a misdemeanor so to do, and a State does not prohibit all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume but does prohibit all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight, which latter measurement will always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume, although the difference is not great, and the Federal statute is not ambiguous as to defining the States protected by it, but it appears from consulting the Congressional Report which accompanied the act to Congress

when it was submitted for passage that the Committee making the report believed that the two measurements, 4 per cent of alcohol by volume and 3.2 per cent of alcohol by weight, provided for identical measurements, it is a crime to attempt to transport intoxicating liquor into a State which only prohibits all sales for beverage purposes of intoxicating liquor containing more than 3.2 per cent of alcohol by weight.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. While there is no conflict between the various Circuit Courts at the present time over the question involved, there is a conflict between the various District Courts. *United States v. Robason,* (D.C. Kan.) 38 Fed. Supp. 991 holds the Liquor Enforcement Act of 1936 applies to the State of Kansas and then points out the conflict between the various District Courts as follows, p. 995:

> "It is interesting to note that in the neighboring state of Missouri the District Judges are not in agreement concerning the Kansas law.
>
> "In United States v. 1940 Model Dodge Coupe, Motor No. D14-191545, No. 674, Judge Merrill E. Otis was of the opinion that the Kansas statute was insufficient.
>
> "On the other hand, Judge Albert Reeves on January 14, 1941, in United States v. Arnold, D.C., 38 F. Supp. 863, was of the opinion the Kansas law qualified Kansas for protection under the Twenty-First Amendment and the Liquor Enforcement Act of 1936."

2. If the basis for the Circuit Court's affirmance of the Petitioner's conviction is that the evidence estab-

lished beyond a reasonable doubt that the two measurements were approximately the same in the sense that there was no legal difference, then the Circuit Court decided an important question of Federal law which has not but should be settled by this Honorable Court and, further, it has decided a Federal question in a way probably in conflict with applicable decisions of this Court, because embraced in such a decision is the proposition of punishing one for the violation of a Federal statute when the acts charged and proved are not plainly within the statute; also, the proposition of creating a Federal offense by construction, both of which propositions have been denied by this Court.

United States v. Resnick, 299 U. S. 207, 81 Law Ed. 127.

3. If the basis of the Circuit Court's affirmance of the Petitioner's conviction is that its examination of the Congressional Report convinced it that Congress intended the Liquor Enforcement Act of 1936 to apply to states which only prohibited all sales of intoxicating liquor containing more than 3.2 per cent of alcohol by weight and that therefore, the act would be construed to apply to the State of Kansas, then the Circuit Court decided a Federal question in a way probably in conflict with applicable decisions of this Court because the act is not ambiguous as to its definition of the states affected by it and under such circumstances, the fact that Congress may have intended something else as shown by Congressional Reports and debates and other data cannot be considered by a Court. *Merritt v. Welsh*, 104 U.S. 694, 702-703; *Hamilton v. Rathbone,* 175 U.S. 414, 419; *Thompson v. United States,* 246 U.S. 547, 550.

4. If the Circuit Court's independent investigation of the relationship between the terms "3.2 per cent by

weight" and "4 per cent by volume" brought it to a different conclusion as regards that relationship then the conclusion that would be justified by a consideration of the undisputed evidence in the record upon the subject, then it has decided a Federal question in a way probably in conflict with applicable decisions of this Court and, further, has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision because while Courts may take judicial knowledge of certain well established facts, they are required to exercise this power with caution, and if there is a reasonable doubt, as there would be here, if the Court in its independent investigation, reached a conclusion different than that that would be justified by considering the evidence upon the subject, the Court must resolve the question in the negative and refuse to take judicial knowledge of the matter in question. *Brown v. Piper,* 91 U.S. 37, 42-43; *Edwards v. U.S.,* 61 Sup. Ct. Rep. 669, 81 Law Ed. 563.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals, Eighth Circuit, should be granted.

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